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MEMORANDUM OF LAW

DATE: October 11, 1996

NAME: Councilmember Warden

FROM: City Attorney

SUBJECT: Are 1996 Campaign Funds Required to be Used to Disgorge to City Treasurer "Tainted" Campaign Contributions Received for 1993 Campaign?

QUESTION PRESENTED

You have asked the City Attorney whether the City's Election Campaign Control Ordinance requires your campaign committee, "Barbara Warden for City Council," to refund "tainted" contributions from your 1993 election to City Council from funds raised for your 1996 election.

BACKGROUND FACTS

On September 6, 1996, the Fair Political Practices Commission ("FPPC"), the enforcement agency for the Political Reform Act (codified at California Government Code sections 81000-91015), entered two enforcement orders that give rise to your question:

In the Matter of Gresham, Varner, Savage, Nolan and Tilden, Mark Ostoich, Patrice Dalman and James Robertson (FPPC No. 95/455) ("Gresham"); and,

In the Matter of Gatlin Development Company and Frank Gatlin (FPPC No. 94/189) ("Gatlin").

In both cases, respondents admitted to having violated state campaign "laundering" laws, specifically, Government Code sections 84300(c) and 84301. In addition to admitting several other violations, the Gresham respondents admitted that on or about December 1, 1993, they reimbursed other persons for having made \$4000 in contributions to your campaign for City Council. In addition to admitting several other violations, the Gatlin respondents admitted that on

or about December 1 and 2, 1993, they reimbursed other persons for having made \$5000¹ in contributions to your campaign for City Council.

Although not stated on the face of either the Gresham or Gatlin enforcement orders, the same facts that gave rise to the admitted violations of state campaign "laundering" laws constitute violations of the City's campaign control laws, in particular, the prohibition against making "assumed name" contributions contained in San Diego Municipal Code ("SDMC") section 27.2950.

In neither the Gresham nor the Gatlin matter was there any allegation or evidence that any recipient candidates or candidate committees knew of the respondents' wrongdoing. This memorandum is not intended to, nor does it in fact, imply any wrongdoing on the part of any recipient candidate or their committee, including you or your committee.

You have drawn a check in the amount of \$5000 from your existing campaign account and are ready to tender it to the City Treasurer, but have not deposited the check pending the outcome of this memorandum of law. The check was drawn on campaign funds that were raised for your 1996 election and which have been held in the "Barbara Warden for City Council" campaign account. This is the same campaign account you opened for your 1993 campaign. As you are entitled by law to do, you kept the account open throughout your first term in office and kept it open for your 1996 campaign.

APPLICABLE LAW

I. Obligation to Disgorge Tainted Contributions Generally

For reasons set forth in the City Attorney's Memorandum of Law dated April 12, 1996 (copy attached), the obligation to disgorge "tainted" campaign contributions which were the result of unlawful reimbursements is located at SDMC section 27.2950, which reads as follows:

No contribution shall be made, directly or indirectly, by any person or combination of persons acting jointly in a name other than the name by which they are identified for legal purposes, not in the name of another person or combination of persons. No person shall make a contribution in his or its name of anything belonging to another person or received from another person on the condition

¹At issue in this memorandum is \$5000 in "tainted" contributions, not \$9000, because Gresham and Gatlin admitted violations based on unlawful reimbursement of the same eleven contributions amounting to \$4000. Gatlin admitted making another \$1000 in unlawful reimbursements.

that it be used as a contribution. When it is discovered by the campaign treasurer that a contribution has been received in violation of this section, the campaign treasurer shall pay promptly, from available campaign funds, if any, the amount received in violation of this section to the City Treasurer for deposit in the General Fund of the City [emphasis added].

Although the Gresham and Gatlin cases were not prosecuted under local law, essentially the facts to which the respondents in each case stipulated constitute violations of SDMC 27.2950, which prohibit persons from making "assumed name" contributions. Therefore, this code section applies to require any incumbent Councilmembers or former candidates who received "tainted" contributions from the Gatlin or Gresham respondents to disgorge those monies to the City Treasurer, if they have any available campaign funds. The question you raise is whether monies raised for your 1996 campaign, since they are held in the same campaign account as the monies you raised (and have already spent) for your 1993 campaign, are considered "available campaign funds" and therefore are required to be used to pay the City Treasurer.

II. Funds Eligible To Be Used To Pay the City Treasurer

The City's ordinance requires the disgorgement to be made from "available campaign funds, if any." The first issue to be addressed is: what campaign funds are eligible to be a source for the disgorgement? This question is examined under both state and local law below.

A. Funds eligible to be used under state law

State law has no requirement for any candidate to disgorge tainted campaign contributions. The obligation arises only under local law. However, state law plays a key role in determining whether campaign funds, as opposed to personal funds, and which campaign funds may be used to meet any disgorgement obligation. Although not relevant for purposes of this memorandum, state law is also critical to determine the reporting requirements for any disgorgement payment. In response to questions from the City of Los Angeles two years ago, the FPPC issued two informal assistance letters addressing the issue of which monies were eligible to be used to disgorge "tainted" campaign contributions under a local ordinance very similar to San Diego's SDMC section 27.2950. These two informal assistance letters were attached to the City Attorney's memo of April 12, 1996, and are again attached here.

Those two informal assistance letters conclude in relevant part that funds existing in any current campaign or officeholder account may be used to pay an obligation to disgorge "tainted" campaign contributions. That is, under state law current campaign funds may be used to pay any disgorgement obligation, even though the facts giving rise to the obligation to disgorge arose out of a 1993 election and even though the funds that are currently held in a campaign account were

raised for a 1996 election. I confirmed this conclusion with FPPC staff attorney Lee Ann Randolph by telephone.

B. Funds eligible to be used under local law

Local law does not change that conclusion. SDMC section 27.2950 requires that disgorgement must be made out of "available campaign funds, if any." We construe this to mean that a person who has an open campaign account for any city office may use those campaign funds to meet the disgorgement requirement in Section 27.2950. Therefore, funds that were raised for an election in 1996 may be used to pay the City Treasurer even though the tainted contributions were received in a 1993 campaign. The harder question remains: whether campaign funds raised for an election in 1996 are meant to be included in the phrase "available campaign funds, if any" and therefore are required to be used to pay an obligation arising out of contributions that were made to a 1993 campaign

III. 1996 Campaign Funds Are Not Required To Be Used To Disgorge To City Treasurer "Tainted" Funds Received For a 1993 Election.

We find that 1996 campaign funds are not required to be used to pay an obligation arising out to a 1993 election, for the following reasons:

First, the phrase "available campaign funds, if any" is ambiguous. Does it refer to the campaign funds that received the tainted contributions or to any City election-related campaign funds, no matter whether there is any link to the tainted contributions? At first blush, the latter interpretation would seem to apply because of the broad terms "available" and "if any." But that interpretation flies in the face of the purpose of the ordinance and would lead to severe injustice.

The main purpose of Section 27.2950 is make certain behavior unlawful: it prohibits persons from making "assumed name" campaign contributions. In other words, SDMC section 27.2950 prohibits one person from reimbursing another for making a campaign contribution to a City election. Persons who do so in violation of this section may be punished for their wrongdoing and are subject to criminal or civil penalties under Section 27.2971 and Chapter I of the Municipal Code.

Significantly, however, the second portion of Section 27.2950 has another purpose, namely, to remedy the harm done to the public trust in the City's election system caused by the unlawful reimbursement or "assumed name" contribution. Section 27.2950's remedy for this damage to the public trust is to place an obligation on the campaign treasurer, once he or she has discovered the violation, to disgorge the "tainted" contributions to the City's Treasurer for the General Fund. This portion of Section 27.2950 imposes strict liability on the campaign treasurer, that is, whether the campaign treasurer knew or did not know that the contributions were tainted,

the treasurer is obligated to pay the "tainted" money or its equivalent to the City Treasurer. Since this portion of Section 27.2950 does not rest on the criminal intent of the campaign treasurer, it is clear that the purpose of the disgorgement provision is not to punish innocent officeholders or their campaigns, but rather to prevent unjust enrichment of the campaign that received the contribution. Under this "unjust enrichment" theory, no purpose would be served by requiring a campaign that is totally unrelated to the campaign that received the tainted contributions to disgorge monies to the City Treasurer. Only if monies remain in the campaign account that relate to the campaign which received the "tainted" contributions would the purpose be served.

Therefore, we conclude that:

- (1) if the campaign that received the "tainted" contributions is over and the account is closed, there is no obligation to disgorge the monies;
- (2) if the campaign that received the "tainted" contributions is over, but the campaign account is still open and it contains monies from that campaign, then the obligation to disgorge remains, up to the amount of monies available in the account or the amount of "tainted" contributions received, whichever is less; and,
- (3) if the campaign that received the "tainted" contributions is over, but the same campaign account is still open and it contains no money from that campaign, then there is no obligation to disgorge any money to the City Treasurer.

Applying the above rules to your question, we find that if your current campaign account contains no money left over from the 1993 campaign, you are under no obligation to disgorge money to the City Treasurer. If there is still some money in the campaign account left over from the 1993 campaign in the campaign account, your campaign treasurer must pay that money to the City Treasurer up to the amount of the "tainted" contributions. Your campaign treasurer is not obliged to use 1996 campaign funds to disgorge "tainted" monies received in the 1993 election.

CONCLUSION

The respondents in two FPPC enforcement cases (Gresham and Gatlin) admitted to violations of state campaign money laundering laws. Those facts also constitute violations of SDMC section 27.2950, which prohibits a person from making "assumed name" contributions. That Municipal Code section requires candidates who received "tainted" campaign contributions to disgorge those "tainted" funds or their equivalent to the City Treasurer, if any campaign funds currently exist. This memorandum concludes that both state and local law permit a candidate to disgorge those monies from a current campaign account. This memorandum also concludes, specifically, that only if your campaign account contains money left over from the 1993 campaign must your campaign treasurer disgorge moneys to the City Treasurer up to the amount of the

"tainted" contributions. Monies raised for your 1996 campaign are not required to be used to disgorge to the City Treasurer "tainted" contributions made to your 1993 campaign.

JOHN W. WITT, City Attorney

By

Cristie C. McGuire
Deputy City Attorney

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Attachment

ML-96-49

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